Office-Supreme Court, U.S.
FILED
JAN 26 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 80-847 and 80-1067

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

COMMON CAUSE, *et al.*,
Appellants,

v.

HARRISON SCHMITT, *et al.*,
Appellees.

and

FEDERAL ELECTION COMMISSION,
Appellant,

v.

AMERICANS FOR CHANGE, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

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January 26, 1981

QUESTION PRESENTED

Whether, in light of the holding in *Buckley v. Valeo*, 424 U.S. 1 (1976), section 9012(f) of the Presidential Election Campaign Fund Act may constitutionally limit the amount of money which political committees may spend as independent expenditures to further the election of a publicly-financed presidential candidate.

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Appellee, Fund For A Conservative Majority ("FCM"), pursuant to Rule 16.1 of the Rules of the Supreme Court of the United States, moves that the decision of the three-judge District Court in the cases below be affirmed

and that appellants' appeals herein be dismissed, on the ground that the questions presented in these appeals are so insubstantial as not to warrant further argument or consideration by this Court.

STATEMENT OF THE CASE

A. The Fund Act.

In 1971, Congress enacted the Presidential Election Campaign Fund Act, 26 U.S.C. §§9001-9013 ("Fund Act"), to provide for public financing of Presidential general election campaigns as an alternative to private fundraising by candidates. In order to be eligible to receive public funding, candidates must certify to the Federal Election Commission (the "Commission") that they and their authorized committees[1] will abide by restrictions on contributions and expenditures which they can incur in connection with their Presidential or Vice Presidential campaigns. 26 U.S.C. §§9002(4), 9003. Specifically, candidates of a major political party who receive public funding under the Fund Act must pledge that neither they nor their authorized committees will incur "qualified campaign expenses"[2] in excess of the

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[1] A "political committee" is defined by the Fund Act as:

> ...any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination of election of one or more individuals to Federal, State, or local elective public office. 26 U.S.C. §9002(9).

A political committee is an authorized committee of candidates for President or Vice President if it is "authorized in writing by such candidates to incur expenses to further the election of such candidates." 26 U.S.C. §9002(1).

[2] "Qualified campaign expenses" are those campaign-related expenses incurred by the candidates, their authorized committees,

[footnote continued]

amount of public funds received, and that they will not accept private contributions to defray such expenses. 26 U.S.C. §9003(b).

The provision of the Fund Act at issue in this appeal, 26 U.S.C. §9012(f), purports to regulate expenditures by political committees which are unaffiliated with, and completely independent of, authorized committees of a Presidential or Vice Presidential candidate. By its terms, 26 U.S.C. §9012(f) makes criminal the expenditure of more than $1,000 by an independent political committee to further the election of a Presidential or Vice Presidential candidate who has chosen to receive public funding of his campaign. Any officer or member of an independent political committee who violates section 9012(f) is subject to a fine of not more than $5,000, or one year imprisonment, or both. 26 U.S.C. §9012(f)(3).

Section 9012(f)(2)(A) and (B) exempt from the strictures and penalties of section 9012(f) expenditures by broadcasters or by a periodical publication in reporting the news or in taking editorial positions, and expenditures by a tax-exempt organization in communicating to its members the views of that organization.

B. FCM's Activities.

Ronald Reagan elected to receive, and did receive, public funding under the Fund Act in order to finance his 1980 Presidential general election campaign. Accordingly, Mr. Reagan and his authorized committees were barred from accepting private contributions to defray the costs of his campaign, and from spending more than the amount which he received under the Fund Act.

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or by any person authorized by the candidates or by any of their authorized committees. 26 U.S.C. §9002(11).

Appellee FCM is a multicandidate political committee,[3] incorporated as a non-stock, not for profit corporation under the laws of Virginia, and is registered with the Commission pursuant to 2 U.S.C. §433. FCM originally registered in 1972 with the General Accounting Office under the name "Young Americans Campaign Committee." On October 13, 1976, FCM amended that filing to change its name to Fund For A Conservative Majority. FCM's existence and operations antedate Ronald Reagan's unsuccessful campaign for the 1976 Republican Presidential nomination and his 1980 Presidential general election campaign.[4] During calendar year 1980, FCM expended approximately $2,000,000 in independent and direct support of various candidates for state and Federal elective office; of that amount, approximately $1,900,000 was spent by FCM as independent expenditures on its project, "Citizens for Reagan in '80," in support of Ronald Reagan.[5] FCM was not formed, has not operated in the past, and did not operate in the 1980 election cycle, solely as a booster of Ronald Reagan's candidacy for President.[6]

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[3] A "multicandidate political committee" is defined as:

> . . . a political committee which has been registered under [2 U.S.C. §433] . . . for a period of not less than 6 months, which has received contributions from more than 50 persons, and, . . . has made contributions to 5 or more candidates for Federal office. 2 U.S.C. §441a(a)(4).

[4] Co-appellee committees Americans For Change and Americans For An Effective Presidency are unincorporated associations which registered with the Commission as political committees on June 3, and July 8, 1980, respectively. Commission Jurisdictional Statement 4-5.

[5] "Citizens For Reagan in '80" was the title of a program administered by FCM, designed to describe its independent expenditures project in support of Mr. Reagan. For documentation of FCM's independent expenditures, *see* FCM's report to the Commission for the period October 16 to November 24, 1980, FEC Form 3X.

[6] Common Cause suggests in its Jurisdictional Statement that FCM used Mr. Reagan's name in the title of its project, "Citizens

[footnote continued]

C. The Proceedings Below.

On July 1, 1980, appellant Common Cause filed a Complaint in two counts against appellee Americans For Change, ("AFC"), its Chairman, and Treasurer (Civil Action No. 80-1609), seeking declaratory and injunctive relief. Count I alleged that defendants' activities on behalf of Mr. Reagan violated 26 U.S.C. §9012(f). *See Common Cause, et al. v. Schmitt, et al.*, No. 80-1609, Appendix to Common Cause Jurisdictional Statement at 77a-81a. Count II alleged that the activities of the defendants also violated other provisions of the Fund Act, and sought pretrial discovery with respect to those activities. Specifically, in Count II of its Complaint, Common Cause asserted that defendants' expenditures would be "conducted in tandem with and parallel to the official Reagan campaign." Such parallelism, it was alleged, resulted in violations on Mr. Reagan's part of his renunciation of private fundraising and excess expenditures in return for public funding of his campaign. *Id.* at 81a-82a.

On July 15, 1980, the Commission filed an action against AFC, Americans For An Effective Presidency ("AEP"), and FCM (Civil Action No. 80-1754), alleging conduct similar to that alleged by Common Cause, and seeking declaratory relief as to the constitutionality of 26

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for Reagan in '80," to "foster the impression that [it was] part of the Reagan campaign." Jurisdictional Statement 8. All of FCM's fund-raising literature made clear by express disclaimers that "Citizens for Reagan in '80" was a project of FCM; that the funds of FCM would be used to assist candidates other than Mr. Reagan; and, that its activities were not paid for or authorized by any candidate. *See, e.g.*, FCM fund-raising literature at Common Cause Exhibits to Appendix I to Jurisdictional Statement 38b-48b.

U.S.C. §9012(f) and its applicability to the activities of defendants.

Two days after the Commission filed its action, Common Cause amended its Complaint to include AEP and FCM as defendants; moved to consolidate its suit with the Commission's action; and, sought to intervene as a plaintiff in that lawsuit. The Commission opposed Common Cause's motion to intervene, and moved to dismiss the Common Cause Complaint on jurisdictional grounds.

Appellees moved for summary judgment and dismissal in both actions, and sought to stay discovery in the Common Cause case. FCM and the other defendants argued that 26 U.S.C. §9012(f) was unconstitutional in its application to their activities.

A three-judge district court was designated on July 16, 1980. The court stayed Common Cause's discovery, took briefing and argument in two stages (one on procedural matters, the other on legal issues), and, on August 28, 1980, issued orders dismissing both actions. As to the Commission's suit, the court granted defendants' motions for summary judgment on the merits. Count I of the Common Cause lawsuit was dismissed as moot in light of the court's disposition of the Commission's suit. Count II was dismissed for want of subject-matter jurisdiction, and for failure to state a claim upon which relief could be granted. On September 30, 1980, the court issued its opinion in support of its August 28, 1980 orders disposing of both actions.

From those orders Common Cause and the Commission have appealed, restating the arguments which were briefed, argued, and rejected below.

ARGUMENT

Before this Court, as they did below, appellants argue that this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), which upheld the rights of individuals and groups to expend money to express themselves on political issues, does not apply to their cases; and, that 26 U.S.C. §9012(f) may constitutionally prohibit precisely the sort of activities which this Court held were protected by the First Amendment. Alternatively, appellants contend that the holding in *Buckley* should be reconsidered in light of circumstances which they claim have changed since that decision.

Section 9012(f) was not before this Court in *Buckley*, but its effect on appellees is identical to that of a similar provision of the Federal Election Campaign Act (FECA) which this Court struck down in that case. The holding of *Buckley* applies with equal force to section 9012(f), for by its terms, that section would bar, appellants contend, invididual citizens from employing an independent political committee[7] as the vehicle for expression of their opinions on the merits of publicly-funded Presidential and Vice-Presidential candidates. *Buckley* does not permit such a limitation on the First Amendment right of political expression. This Court should say so by dismissing the appeals of Common Cause and the Commission, and by affirming the decision of the court below, citing *Buckley v. Valeo, supra.*

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[7]Common Cause has conceded that for purposes of its appeal, appellees "operated independently of the official Reagan campaign." Jurisdictional Statement 6 n.7. The Commission did not allege below and does not claim on appeal that appellees are not independent of Mr. Reagan and his authorized committees.

I.

THE COURT SHOULD NOT REVERSE THE DECISION BELOW AND REMAND THE CASE IN ORDER TO PERMIT COMMON CAUSE TO CONDUCT DISCOVERY.

Common Cause contends that, in its present posture, its case is not capable of fair constitutional adjudication, inasmuch as the court below did not permit it to conduct its requested discovery. Jurisdictional Statement 13-16.

Discovery was and is unnecessary. Appellee committees conceded below, either in their pleadings or in oral argument, that their conduct in raising and expending money to further the election of Ronald Reagan came within the proscriptive scope of 26 U.S.C. §9012(f). By conceding the applicability of section 9012(f) to their activities, appellees presented squarely to the court below the issue of the constitutionality of that section.

Common Cause now claims that its thwarted discovery would have provided a factual basis for determining whether appellees' conduct posed the dangers of *quid pro quos* which this Court recognized as potentially harmful in *Buckley*. Jurisdictional Statement 14 n.16. But this Court has already held that "the absence of prearrangement and coordination" of independent expenditures "not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Buckley v. Valeo*, 424 U.S. at 47.[8]

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[8] That the Court was correct on this issue is demonstrated by the loudly-voiced disappointment of other independent expenditure groups, and the "New Right" in general, with Mr. Reagan's cabinet selections. Mr. Reagan's philosophy, as evidenced by his appointments to date, is apparently not a captive of those who made independent expenditures on behalf of his candidacy for President.

The district court did not decide these cases in a vacuum, as Common Cause has suggested. Jurisdictional Statement 13-16. What it did was to refuse to permit Common Cause to prosecute an enforcement action which, under statutes, is an activity reserved to the Commission. 26 U.S.C. §9010; 2 U.S.C. §437g. It had before it the concessions by appellees of their conduct, the apparent proscription of 26 U.S.C. §9012(f), and appellees' constitutional challenge to that section. The court simply followed the clear holding of *Buckley* and decided that 26 U.S.C. §9012(f) could not constitutionally prohibit appellees' independent expenditures on behalf of Ronald Reagan.

II.

THE FACT THAT SECTION 9012(f) IS PART OF A STATUTORY SCHEME FOR THE PUBLIC FINANCING OF PRESIDENTIAL ELECTIONS DOES NOT SAVE IT FROM CONSTITUTIONAL INFIRMITY.

A. Congress may not constitutionally limit independent expenditures in order to safeguard other provisions of the Fund Act.

The Commission points to the comments of various Senators made in the course of Congressional debate, which, it argues, demonstrate that section 9012(f) of the Fund Act is intended to serve as a bulwark against individuals who might form political committees to raise and spend money which they could not give to the candidate of their choice because that candidate had elected to receive public funding of his campaign. Jurisdictional Statement 12-13. If that is the purpose of section 9012(f)—and both appellants claim that it is—then 26 U.S.C. §9012(f) is unconstitutional.

If the expenditures of an individual, political committee, or other group are determined to have been made by prearrangement, or in some other prohibited way in concert with the official campaign of a publicly-financed candidate, those expenditures would violate both the Fund Act and FECA. The expenditures would be deemed to be contributions to the candidate, as well as excess qualified campaign expenses incurred by that candidate, 2 U.S.C. §441a(a)(7)(B)(i), subjecting the candidate and his authorized committees to civil and criminal sanctions. 26 U.S.C. §§9007, 9012(a); 2 U.S.C. §437g. Thus, while preventing circumvention of the contribution and expenditure limitations of the Fund Act, section 9012(f) also severely—and unconstitutionally—restricts independent advocacy, despite its substantially diminished potential for abuse. *Buckley v. Valeo,* 424 U.S. at 47.

Appellants' arguments are similar to the justification advanced by the lower court in *Buckley*, in upholding the challenge of plaintiffs, to a provision which was almost identical to section 9012(f). That court styled the section at issue there, section 608(e)(1) (18 U.S.C. §608 (e)(1), *construed in Buckley v. Valeo, supra, repealed by* Pub. L. 94-283), a " 'loophole-closing provision only' that is necessary to prevent circumvention of the contribution limitations." *Buckley v. Valeo,* 424 U.S. at 44.

Section 608(e)(1) provided that no person could make any expenditure in excess of $1,000 in a calendar year relative to a clearly identified candidate. According to this Court, "the plain effect of §608(e)(1) [was] to prohibit all individuals, who are neither candidates nor owners of institutional press facilities, *and all groups*, except political parties and campaign organizations, from voicing their views 'relative to a clearly identified candidate' through means that curtail aggregate expenditures of more than $1,000 during a calendar year."

Buckley v. Valeo, 424 U.S. at 39-40 (emphasis added). Section 608(e)(1) and 26 U.S.C. §9012(f) are of identical effect on FCM. Both would place onerous restrictions on what FCM has done in this case: to raise and spend money to advance the cause of a candidate in a Presidential general election, by means which are independent of that candidate and his official campaign. Both are defended on the ground that they are necessary to bolster and enforce other, less offensive, restrictions on constitutional freedoms.

What this Court said in *Buckley* of section 608(e)(1) applies with equal force to appellants' arguments in support of 26 U.S.C. §9012(f):

> The markedly greater burden on basic freedoms caused by §608(e)(1) thus cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations. Rather, the constitutionality of §608(e)(1) turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression.
>
> We find that the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify §608(e)(1)'s ceiling on independent expenditures.

Id. at 44-45.

B. Section 9012(f) limits independent expenditures by entities protected under *Buckley v. Valeo*.

Common Cause argues that sections 608(e)(1) and 9012(f) differ in that the former restricted expenditures by persons, political committees, groups, or individuals, while section 9012(f) restricts independent expendi-

tures by political committees only, not informal groups or individuals. This, Common Cause claims, makes all the constitutional difference. Jurisdictional Statement 25-26.

In holding section 608(e)(1) and other sections of FECA constitutionally deficient in *Buckley*, this Court noted that "a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, *groups*, and candidates." *Buckley v. Valeo*, 424 U.S. at 39 (emphasis added). The Court overturned what it considered to be "substantial and direct restrictions on the ability of candidates, citizens and *associations* to engage in protected political expression, restrictions that the First Amendment cannot tolerate." *Id.* at 58-59 (emphasis added). Thus, the holding in *Buckley* did not turn on the effect of section 608(e)(1) on individuals alone. Rather, the Court premised its holding on that section's effect on individuals *and groups*. The fact that the Court mentioned entities other than individuals can only mean that the First Amendment right of political expression may not be abridged on the basis of the identify of the speaker.[9]

Common Cause also urges that section 9012(f) must be upheld because it would be "unworkable and ineffective if it reached only political committees that are affiliated or coordinated with the candidate's official campaign organization." Jurisdictional Statement 18.[10] It would

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[9]Since *Buckley*, this Court has noted that free expression may not be limited on the basis of "the identity of its source, whether corporation, *association*, union, or individual." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) (emphasis added).

[10]Common Cause attempts to constitutionally justify the burden of section 9012(f) by claiming that it is necessary because proving the coordination prohibited by the Fund Act is "difficult

[footnote continued]

also be unnecessary since, as pointed out above, knowing or intentional cooperation between authorized and unauthorized committees is elsewhere prohibited under the Fund Act and FECA.

Public financing of Presidential campaigns can and does work. But it cannot do so at the expense of the rights of association and political expression of those who are independent of a candidate's campaign.[11]

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and time-consuming." Jurisdictional Statement 18 n.20. Common Cause has filed with the Commission, pursuant to 2 U.S.C. §437g, an administrative complaint alleging that appellees were not in fact independent of the official Reagan campaign. The Commission is proceeding with its investigation of that complaint. That the procedure set out by Congress for such investigations may be time-consuming does not justify a severe, almost total, restriction on independent expenditures by political committees.

[11]It does not follow, as the Commission implies by its citation of *Republican National Committee v. Federal Election Commission*, 487 F.Supp. 280 (S.D.N.Y. 1980), *aff'd* 616 F.2d 1 (2d Cir. 1980) (en banc) (per curiam), *aff'd* 445 U.S. 995 (1980), that this Court's summary affirmance in that case argues for the constitutionality of section 9012(f). The provisions at issue in that case involved expenditure limitations imposed on *candidates* who accepted public funding under the Fund Act.

That is not this case. Here we deal with restrictions on *independent groups of citizens* who wish to spend money in support of the candidate of their choice, but, apparently because of section 9012(f), they are prohibited from doing so by virtue of the *candidate's* election to receive public funding. The candidate voluntarily gives up his opportunity to solicit private contributions when he accepts public funding of his campaign. That decision cannot bind his unaffiliated supporters and thereby prevent them from banding together in the exercise of their constitutional right of association.

III.

THE DISTRICT COURT DID NOT ERR IN DECLARING SECTION 9012(f) TO BE AN UNCONSTITUTIONAL ABRIDGEMENT OF FREEDOM OF SPEECH AND ASSOCIATION.

A. The donations by individuals to independent expenditure groups constitute protected speech by those individuals.

In *Buckley*, this Court drew a constitutional distinction between political contributions and expenditures. Limitations on contributions were constitutionally sanctioned; similar limitations on expenditures were not. The Court held that contribution limitations were a constitutionally appropriate means of combating the appearance or fact of improper influence stemming from the dependence of candidates on large campaign contributions. The ceilings imposed therefore served the compelling governmental interest in safeguarding the integrity of the electoral process without directly impinging on the rights of citizens to engage in political debate and discussion. *Buckley v. Valeo*, 424 U.S. at 21-35. Ceilings on independent expenditures, however, place substantial and direct restrictions on the ability of candidates, citizens and associations to engage in protected political expression, restrictions which the First Amendment cannot tolerate. *Id.* at 39-51.

The crux of appellants' argument before this Court is that appellees are *soliciting* and spending funds, with the assistance of fund-raising and media experts, to express the views of their contributors on the merits of the candidates in the 1980 presidential general election. To avoid the plain holding of *Buckley* that such expenditures are constitutionally protected, appellants make two arguments: first, they contend that what is actually at

issue in this appeal are *contributions* by individuals to the independent committees, rather than *expenditures* by those committees; alternatively, appellants argue that these independent expenditures are of a great magnitude than envisioned by this Court in *Buckley* and, therefore, ought not to be permitted.

Common Cause contends that Section 9012(f) is constitutional because it does not restrict any person's right "to associate himself with any candidate, political party, group, or other entity. All it regulates is the use by political committees of money contributed in response to mass solicitation appeals." Jurisdictional Statement 26. That is not what that section regulates. Section 9012(f) does not address how the funds which it purports to regulate have been raised. Appellants argue that it is a flat proscription of all independent expenditures above a certain level by political committees. If so, it does what section 608(e)(1) did in *Buckley*. It "precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association." *Buckley v. Valeo*, 424 U.S. at 22. All FCM has done is to effectively amplify the voice of its adherents.

According to Common Cause, groups of individuals are free to pool their own money and to spend it themselves without limit. Jurisdictional Statement 24. But they may not, in appellant's view, do so through third parties who collect and spend that money, least of all through third-parties with some expertise in the art of fund-raising and political expression.[12] Whether there is an air of

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[12]Common Cause complains that a "band of political pros" and "a few political operators" are involved in the independent

[footnote continued]

expertise to independent expenditures should not be constitutionally significant, for whether speech can be constitutionally restricted does not turn on the identity of the speaker. *First National Bank of Boston v. Bellotti, supra.* The focus should be on whether the *speech* is protected. This Court said in *Buckley* that it is.

The Presidential campaigns of the major party candidates in the 1980 general and primary campaigns were funded from the public fisc with large sums of money. Those candidates had at their disposal the most sophisticated means of communication and political advice to assist them in presenting their views to the American public. Appellants' model of a group of citizens who have banded together to contribute their own funds and time to express their political views is unrealistic in light of modern day realities, including the cost of effective communication. This Court has noted that "virtually every means of communicating ideas in today's mass society requires the expenditure of money.... The electorate's increasing dependence on television, radio and other mass media for news and information has made

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expenditures of appellees and others. Jurisdictional Statement 28. It is simply unrealistic to assume that independent political committees which raise and expend money to express the views of their contributors will not seek the assistance of those with expertise and experience in such matters. All publicly-supported organizations, even Common Cause, seek the help of seasoned professionals in their fund-raising efforts.

Quaere: In view of Common Cause's concern about the effect of such experts on the political process and its solicitude for "groups of individuals free to pool their own money," would Common Cause object if a group of such professionals pooled their own money to express their political views? Could any one of them collect that money and decide precisely how it is to be spent, or would that make the group a "political committee?"

these expensive modes of communication indispensable instruments of effective political communication." *Buckley v. Valeo*, 424 U.S. at 19. Appellants' ideal would consign such groups to political impotency because they could not afford to express themselves in any way which would be likely to have an impact on public debate.

As the lower court has observed, a contributor's First Amendment rights are not coextensive with his actual participation in preparing or placing an advertisement. There is no constitutional reason why like-minded individuals cannot form a "political committee" for the purpose of making independent expenditures of a candidate. Likewise, there is no reason why individuals should not be able to contribute to an already-existing committee, and it should make no constitutional difference that such contributions are made in response to a fund-raising appeal prepared by a professional fund-raiser. Nor should it matter whether the contributor's speech is given voice by the contributor himself or whether it has a professional touch to make it more effective. The issue is whether such speech is constitutionally protected.

Appellants have chosen to focus their constitutional analysis on the mechanics of the expenditure (the donation of money to a committee), which they claim make it a contribution, rather than on its effect, which is to permit citizens of average means to make their political viewpoint heard in a loud and crowded political arena. In citing the language of *Buckley* which upheld limitations on contributions, appellants have ignored this Court's explanation of that holding:

> Given the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if

> the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy. *There is no indication, however, that the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations.* The overall effect of the Act's contribution ceiling is merely to require candidates and political committees to raise funds from a greater number of persons and *to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression.*

Buckley v. Valeo, 424 U.S. at 21-22 (emphasis added).

In appellants' view, expenditures by professionally-run independent expenditure committees are permitted, subject to the strictures of section 9012(f), but contributions to those committees are not, because the money contributed is transformed "into political debate . . . by someone other than the contributor." Common Cause Jurisdictional Statement 22, citing *Buckley* at 21. If appellants are correct, there will indeed be a "dramatic adverse effect on the funding of campaigns and political associations," *Buckley v. Valeo*, 424 U.S. at 21, and the "total amount of money potentially available to promote political expression" will be reduced. *Id.* at 23. In short, precisely those consequences which this Court believed would not follow, and which justified its decision in *Buckley* upholding contribution limitations, will come about if appellants' view is adopted by this Court.

What appellants want is *Buckley* and more: no individual contributions and no significant independent expenditures, certainly not by political committees fi-

nanced by the donations of those who would otherwise not be heard.

Even the small, self-governing groups idealized by Common Cause, and the "informal groups" envisioned by the Commission, would run afoul of section 9012(f). Although the Commission claims that it has never decided that an informal group, in which individuals retain control over their funds, would be considered a "political committee,"[13] groups very much like those extolled by appellants have been so held.

In Advisory Opinion 1976-51 (issued September 2, 1976), Fed.Elec.Camp.Fin.Guide (CCH), ¶5215, the Commission ruled that an informal discussion group that discussed general foreign policy was considered a "political committee." In its request for a written opinion from the Commission, the group indicated that its general expenses might exceed $1,000 in a calendar year, and that there was a possibility that contributions in the form of checks from individual members of the informal discussion group to a particular candidate might be collected by one person of the group and delivered to a candidate who may have been "the subject of discussion" among the individuals of the group. Thus, according to the Commission, this once "informal" discussion group, which made an "an hoc" collection of contributions, became a political committee, was required to register with the Commission, open a bank account, elect a treasurer and chairman, file disclosure reports with the Commission, and was otherwise subject to the myriad civil and criminal penalties of FECA.

In Advisory Opinion 1979-41 (issued September 13, 1979), *Id.* at ¶5247, the Commission ruled that a group

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[13]Commission Jurisdictional Statement 19.

which purchased an advertisement in the *New York Times* was a political committee if the cost of the advertisement exceeded $1,000 and the "basic thrust" of the advertisement was to seek an *unidentified* alternative candidate to President Carter. The Commission concluded that "a group soliciting funds and making expenditures which are expected to be in excess of $1,000" would be considered a "political committee."

Thus, it is possible—indeed, likely—that the expenditures of groups such as those suggested by appellants would in fact be found to come within the expenditure limitations of section 9012(f). Application of that section to such groups would effectively eliminate them as voices in the political process, since a group of individuals, required to prepare and distribute their own political literature and bound by a $1,000 limitation on its expenditures, would be ineffective, cumbersome, and probably more trouble than it was worth to its members. Of course, individuals would remain free to make unlimited independent expenditures to the extent that they could afford to do so. But not many individuals could afford to spend enough money to give effective voice to their views.

B. The political speech of individuals may not be abridged because of the growth of independent expenditure groups through which they speak.

Appellants argue that there has been a change in the landscape of Presidential election campaigns since 1976, when *Buckley* was decided. They complain that the growth of independent expenditures has been greater than expected and that, consequently, the managers and financial decision-makers of committees like FCM pose a danger of the sort sought to be eliminated by public funding of Presidential campaigns.

Independent expenditure committees like FCM cannot exist without the donations of their contributors. Such committees provide the only means by which like-minded citizens can unite in an effective way to make themselves heard. It is the chorus of voices of the contributors to an independent expenditure group which makes it effective. Although the power of the purse of such a group is important, it is ephemeral, for it exists only so long as contributors continue to give their money to that group; and, they will give only so long as that group is perceived by them to be representing their point of view. It is this authority on the part of the decision-makers of independent expenditure groups which appellants decry.[14]

The Fund Act is not aimed at extirpating the influence of those who control the donations of many small contributors. That statute is aimed at preventing outright contributions directly to a candidate, or expenditures on his behalf made in concert or cooperation with the candidate, by individuals or groups of contributors. It is these contributors who, unlike the chairman of a donor-supported independent expenditure group, can condition their expenditures on the receipt of special influence or some other improper *quid pro quo*. Just as a single wealthy individual, or an "informal group" of wealthy individuals (if they escape the Commission's expansive view of a "political committee"), can make independent expenditures on a large scale, so

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[14]If groups like FCM have been successful in raising funds, it is because the American public have been willing to contribute their money in order to make themselves heard. As a further safeguard against any one contributor exerting undue influence on an independent expenditure group, 2 U.S.C. §441a(a)(1)(C) provides that an individual may give no more than $5,000 per calendar year to a political committee.

also should groups of less prosperous citizens be able to pool their resources to make independent expenditures.

So long as FCM and other groups like it are independent of the candidate or his official campaign, under *Buckley* and the First Amendment they cannot be restricted in their expenditures, for their expenditures represent the protected speech of their contributors. This Court should so hold.[15]

CONCLUSION

Accordingly, the Court should summarily affirm the decision of the district court below and dismiss the appeals of Common Cause and the Commission, citing *Buckley v. Valeo, supra.*

Respectfully submitted,

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January 26, 1981

[15]In addition to the constitutional deficiencies discussed above, we also note that section 9012(f) contains two exemptions from its provisions, which raise constitutional questions relating to the underinclusiveness of that provision. *Cf. First National Bank of Boston v. Bellotti, supra,* at 793.